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Supreme Court of the United States

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MICHAEL RODAK, JR.

October Term, 1974

No. 74-1397

UNITED STATES OF AMERICA,

Respondent,

vs.

SAMUEL RIZZO DE CAVALCANTE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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TABLE OF CONTENTS

Page

Opinions Below 1

Jurisdiction 1

Questions Presented 2

Constitutional Provisions and Statutes Involved 2

Statement of the Case 2

Reasons for Granting the Writ 4

I. A motion for a hearing pursuant to 18 U.S.C. §2518(10) is timely after trial, hearing or proceeding when the movant was not aware of the grounds of the motion prior thereto. 4

II. A guilty plea does not waive a defense that later became available through judicial decision. 5

III. Rule 32(d) of the Federal Rules of Criminal Procedure provide for withdrawal of a guilty plea after imposition of sentence. 6

Conclusion 7

TABLE OF CITATIONS

Page

Cases Cited:

Grier v. United States, 472 F.2d 1157 (5th Cir. 1973) 5

United States v. Chavez, 478 F.2d 512 4

United States v. DeCavalcante, 449 F.2d 139 (3d Cir. 1971), cert. denied, 404 U.S. 1039 (1972) 3

United States v. Giordano, 94 S. Ct. 1820 ..... 4, 5, 6

United States v. Sepe, 474 F.2d 784 (5th Cir. 1974) 5

United States v. Washington, 341 F.2d 277 (3d Cir. 1965) 6

Statutes Cited:

Title III of the Omnibus Crime Control & Safe Streets Act of 1968:

18 U.S.C. §2516(1) 4, 5

18 U.S.C. §2518(10) 2, 3, 4, 5

28 U.S.C. §1254(1) 1

Contents

Page

Rule Cited:

Federal Rules of Criminal Procedure, Rule 32(d) 2, 6

APPENDIX

A - Oral Opinion of the United States District Court 1a

B - Order of United States District Court Filed December 3, 1974 ..... 18a

C - Opinion and Order of the United States Court of Appeals For the Third Circuit 20a

In The

Supreme Court of the United States

October Term, 1974

No.

UNITED STATES OF AMERICA

Respondent,

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the United States District Court was oral, unreported and appears in appendix, *infra* (1a). The opinion of the Court of Appeals for the Third Circuit entered on April 8, 1975, is unreported and appears in the appendix, *infra* (20a).

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was made and entered on April 8, 1975. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

In this suit the United States District Court denied petitioner's notice of motion for a hearing pursuant to 18 U.S.C. §2518(10). The Court of Appeals for the Third Circuit affirmed the judgment of the United States District Court.

The questions presented are:

1. Does not 18 U.S.C. §2518(10) provide relief where an individual has failed to exercise his right to a hearing pursuant to that statute based upon representations made by the United States Attorney which have subsequently, in similar instances, been found to be invalid?

2. Does a defendant by entering a guilty plea waive a defense which later becomes available through judicial decision?

3. Does a plea based upon misrepresentations of the government fall within the scope of manifest injustice as used in Rule 32(d) of the Federal Rules of Criminal Procedure?

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The federal statute involved is Title III of the Omnibus Crime Control and Safe Streets Act of 1968, specifically 18 U.S.C. §2518(10).

STATEMENT OF THE CASE

On December 15, 1969, the petitioner was indicted in Criminal No. 544-69 and charged with conspiracy to violate

federal laws prohibiting the use of the telephone for the purpose of operating an interstate gambling ring. On January 15, 1971, the petitioner entered a plea of guilty to the indictment.

On March 15, 1971, petitioner moved to withdraw his guilty plea. The motion was denied and he was sentenced to a ten thousand dollar ($10,000) fine and five years imprisonment. The United States Court of Appeals for the Third Circuit affirmed the District Court's refusal to allow withdrawal of the plea. *United States v. DeCavalcante*, 449 F.2d 139 (3d Cir. 1971), *cert. denied*, 404 U.S. 1039 (1972).

On November 11, 1974, petitioner made application to the United States District Court for the District of New Jersey for a hearing pursuant to 18 U.S.C. §2518(10) so that he could demonstrate the requisite "manifest injustice" to allow him to withdraw his plea of guilty in this case. The District Court denied petitioner's application for a hearing pursuant to 18 U.S.C. §2518(10) and petitioner's motion to withdraw the plea. The United States Court of Appeals for the Third Circuit affirmed the District Court's judgment in its judgment-order entered on April 8, 1975.

This petitioner takes the position that there is the strong possibility that the application for the wiretaps in this case was invalid and that the evidence obtained from the wiretap upon which the petitioner based his plea was, therefore, illegally obtained and that this is sufficient to allow petitioner to withdraw his plea. It is only through a hearing pursuant to 18 U.S.C. §2518(10) that this contention can be proven.

REASONS FOR GRANTING THE WRIT

This case raises a question regarding 18 U.S.C.§2518(10) upon which this Court has not as yet spoken.

I.

A motion for a hearing pursuant to 18 U.S.C. §2518(10) is timely after trial, hearing or proceeding when the movant was not aware of the grounds of the motion prior thereto.

In *United States v. Giordano,* 94 S. Ct. 1820, this Court held that the Congress did not intend the power to authorize wiretap applications to be exercised by any individuals other than the Attorney General or an Assistant Attorney General specifically designated by him. At the suppression hearing in the case it developed that the application had not been approved and authorized by the Assistant Attorney General, Will Wilson, as the applications had indicated. This Court held that the procedure used by the Attorney General's office violated 18 U.S.C. §2516(1). The defendant in the case presently before the Court has cause to believe that as in *United States v. Giordano, supra,* the government in securing authorizations to institute wiretaps did not comply with the law as set down in 18 U.S.C. §2516(1). Prior to *Giordano, supra,* the defendant had no reason to believe that the government would be capable of "apparently deliberate deception of the courts by the highest law officers in the land." *United States v. Chavez,* 478 F.2d 512.

The documents turned over to the defendant by the government indicated that the wiretap applications had been

authorized by the proper officials. Assuming arguendo that the government had supplied the defendant with documents which misidentified the individual authorizing the application for wiretaps it would be a miscarriage of justice for the defendant to be denied his right to a hearing because the misrepresentations of the government led the defendant to believe he had no basis for contesting the validity of the wiretap authorizations. The individual named on the applications had the authority to authorize wiretap applications and, thus, the defendant was led to believe that the government had, in fact, complied with 18 U.S.C. §2516(1) and the grounds for a motion under 18 U.S.C. §2518(10) were not apparent since the defendant was not aware of the misrepresentations, inadvertent or otherwise, which *United States v. Giordano, supra,* revealed the government had been making in this area.

II.

A guilty plea does not waive a defense that later became available through judicial decision.

"When made by the accused, knowingly, willingly and with benefit of counsel, a plea of guilty waives all non-jurisdictional defects." *United States v. Sepe,* 474 F.2d 784 (5th Cir. 1974). The exception to this rule is pointed out in *Grier v. United States,* 472 F.2d 1157, 1158 (5th Cir. 1973): "An exception to this rule is that a defendant cannot be presumed to have waived a defense that later became available through judicial decision."

This application comes within the exception to the general rule as above described because of the recent decision of this Court in *United States v. Giordano, supra.*

III.

Rule 32(d) of the Federal Rules of Criminal Procedure provide for withdrawal of a guilty plea after imposition of sentence.

". . . To correct manifest injustice, the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea." Rule 32(d) of the Federal Rules of Criminal Procedure. A finding of manifest injustice under Rule 32(d) does not require as strong a showing as a deprivation of due process. "While there may be a considerable overlap, the concept of "manifest justice" under Rule 32(d) permits the judge a greater latitude than the requirements of constitutional 'due process'." *United States v. Washington*, 341 F.2d 277, 281 n. 3 (3d Cir. 1965). Assuming that the defendant is correct in his contention that the wiretaps were illegal under the holding of this Court in *United States v. Giordano, supra*, this application for withdrawal of the guilty plea entered in this case comes within the ambit of the 'manifest injustice' criterion. The defendant entered his plea on the basis of evidence which was the point of an illegal wiretap. The misrepresentations of the government left the defendant unaware of the grounds to challenge the validity of the wiretaps. Certainly the defendant's position was prejudiced to the extent that he should now be allowed to withdraw his plea.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that this petition for a writ of certiorari be granted.

Respectfully submitted,

s/ Constantine S. Loukedis
s/ G. Dolph Corradino
Attorneys for Petitioner

APPENDIX A — ORAL OPINION OF THE UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY

Criminal No. 544-69

UNITED STATES OF AMERICA

vs.

SAMUEL DeCAVALCANTE,

Defendant.

Newark, New Jersey
November 11, 1974

Before: HONORABLE H. CURTIS MEANOR, U.S.D.J.

Appearances:

JONATHAN GOLDSTEIN, ESQ.
United States Attorney
By: ROBERT DEL GRASSA, Esq.

MESSRS. LIEBOWITZ & CORRADINO
Attorneys for the Defendant
By: G. DOLPH CORRADINO, Esq.

Oral Opinion of the United States District Court

MR. CORRADINO: If it please the Court, this is the adjourned return day of a notice of motion filed on behalf of the defendant wherein we seek several types of relief.

But I think at this juncture, the primary thrust of our motion is pursuant to paragraphs A, B, and D of our notice of motion, wherein we request a hearing pursuant to 18 United States Code 2518, Section 10.

In addition to that, a limited type of discovery as set forth in that statute, and any discovery granted, we respectfully request be held confidential.

THE COURT: Now, look, as I gather it, Mr. DeCavalcante was indicted in this case, and the Government has evidence against him that was gleaned from wiretaps, is that correct?

MR. CORRADINO: Yes, Judge.

THE COURT: He also had some other matters pending in the Court of Appeals, right?

MR. CORRADINO: At some point in time during the pendency of this matter.

THE COURT: Then he pleaded guilty in this case.

MR. CORRADINO: He withdrew his plea of not guilty to guilty.

Oral Opinion of the United States District Court

THE COURT: What was it? A plea bargain? A dismissal of some counts?

MR. CORRADINO: No, there was a plea bargain, but I don't think there were any counts dismissed, Judge.

THE COURT: What was the bargain?

MR. DEL GRASSA: Your Honor, if Mr. DeCavalcante pled guilty to the instant matter, the dangerous special offenders statute would not be able to take effect.

THE COURT: That is in your affidavit, I recall. Now, you come forward — well, what happened to this case in the Court of Appeals? Got reversed?

MR. CORRADINO: Yes.

THE COURT: Were there retrials or what?

MR. CORRADINO: It was reversed and dismissed.

THE COURT: So historically, it turned out to be an excercise in bad judgment with the guilty plea.

MR. CORRADINO: In a sense.

THE COURT: Because that kept him in jail and his reversal wouldn't let him out. He's out now?

Oral Opinion of the United States District Court

MR. CORRADINO: Reversal was on another indictment which he was sentenced to fifteen years. That was reversed and dismissed.

THE COURT: He served this sentence, hasn't he?

MR. CORRADINO: Yes, he has. He paid his fine, that's correct.

THE COURT: Now, I take it, with the advent of the Giordano and Chavez cases, you now come in and you are contending that the Government's wiretap evidence was not obtained in compliance with the statute as construed in those cases.

MR. CORRADINO: We contend that, Judge, but we submit to the Court we are not sure of that set of facts. That's why we ask for this hearing.

THE COURT: But that would be basically your contention, correct?

MR. CORRADINO: Yes.

THE COURT: If that contention cannot be heard or fails as a matter of fact, then the guilty plea stands, right?

MR. CORRADINO: I would think so, at this point, yes.

THE COURT: Then I think you had better direct your argument to this proposition: Does not his guilty plea foreclose

your asserting the proposition that the Government's evidence against your client was illegally obtained?

MR. CORRADINO: We contend it does not, Judge. There is no question that the prevailing general rule is that when you do take a voluntary plea —

THE COURT: You waive every defect.

MR. CORRADINO: Waives all non-jurisdictional defects, that's correct.

THE COURT: Suppose there is a search and seizure without a warrant? Defendant has the motion to suppress pending and he decides — he gets a plea bargain and he desires to plead? Can he later be heard to argue that the evidence against him, without which he could not have been convicted was seized unconstitutionally, therefore, vitiates his plea of guilty?

MR. CORRADINO: Judge, generally, I would say no, he could not.

But I think you would have to examine very closely the reasons for his motion after the plea.

We submit to you Honor respectfully that the situation in this case here really falls within that exception to the general rule that we have been discussing.

Oral Opinion of the United States District Court

THE COURT: What is the exception?

MR. CORRADINO: That is, you cannot be presumed to have waived a defense that was not available to you at the time you made your guilty plea.

THE COURT: Where were these Chavez cases at the time? Pending in the United States Supreme Court? Had they been reported anywhere? Chavez and Giordano?

MR. CORRADINO: I don't think so because, as I understand the facts, I know the date of the case, but I think the motion to suppress and the hearing was in '70, whereas this matter was, I think, concluded at that time.

THE COURT: Wasn't there also a rule that a change in the law — well, let's take — there was a case this spring that I had something to do with because of another criminal matter, United States against Mays, where the U.S. Supreme Court construed somewhat narrowly the mail fraud statute.

Are you familiar with it? The use of credit cards?

MR. CORRADINO: No, I am not.

THE COURT: Contrary to several Courts of Appeals. Now, do you think that the man who pleaded guilty in other Circuits in cases which were overruled by the U.S. Supreme Court could now gallop to the Federal courthouse and obtain — or even those who were convicted after trial — and pursue their

appeal? A change in law like that won't be honored, won't be honored to the point of letting a guilt plea be withdrawn or permitting the vacating of a conviction.

MR. CORRADINO: I don't know. I think, Judge, that the decisional laws that come down subsequent to a plea of guilty have been the type of change in law that falls within that exception, that I am referring to.

When I say to your Honor: This case, we strongly feel, falls within the four corners of the exception, at the time, Judge, that Mr. DeCavalcante entered his plea, this case was not law, if we may say that, and no one was aware at the time that this defense was going to be available.

If it had, Judge, I am sure, especially considering the type of defense attorneys that were involved at that time, motions would have been made.

THE COURT: No question about the competency of his representation, is there?

MR. CORRADINO: Oh, no, not at all. That is why I am saying that if this case were reported at that time, I am sure the motions would have been made and the tapes would have been suppressed. That is why the motion is being made now.

At that time, he did not know that this defense was available. He didn't have the opportunity to raise this defense. Now, he has.

I think, as a result of that, he should have an opportunity to have this hearing and find out whether or not the procedures followed in this case coincide with the procedures which were followed in Giordano, which resulted in the suppression of those tapes.

THE COURT: Well, I am willing to assume, for purposes of the issue, I think the most important one here, that the evidence that Mr. DeCavalcante found himself confronted with at the time he entered his plea was, in fact, taken —

MR. CORRADINO: I am sorry, Judge?

THE COURT: I am willing to assume, for purposes of getting at what I think is the most important issue here, arguendo, that the evidence that confronted Mr. DeCavalcante at the time he entered this plea, you now seek to vacate, was in fact obtained in violation of the statute as construed in Giordano and Chavez.

Let's start with that. We will never know that unless we have a hearing.

Assuming, arguendo, that that is so, are you able to raise it at this time? That's my problem.

MR. CORRADINO: We feel that we do, Judge, have that opportunity.

THE COURT: I will hear from the Government.

Oral Opinion of the United States District Court

MR. DEL GRASSA: Your Honor, I think the one point you just made, that there is no question about the competence of counsel, I have heard of Mr. Brown's reputation and I have just come here from the Eastern District of New York. But, however, I heard of Mr. Brown, and there is no question that Mr. Brown is most familiar with the Title 32 statute which includes 18 United States Code, 2510, through 2520.

It is up to the attorney himself to go through that, and it should have been, and it is something that he should have known as to whether or not the proper individual authorized the attorney that was handling the matter to go before the particular Judge and ask for the particular electronic surveillance.

THE COURT: Nonetheless, let us assume, for purposes of argument, as I think we have to, that the evidence that confronted this defendant at the time he pleaded in this case was in fact obtained in violation of the statute.

MR. DEL GRASSA: We will make the assumption, arguendo; we can make that assumption, but it is not necessarily so.

THE COURT: I know.

MR. DEL GRASSA: I would like to say that just going to twenty-five eighteen ten (a), it says that any aggrieved person at any trial, hearing or proceeding entered before any Court, department, officer, agency, regulatory body, or other authority of the United States, etc., and starts talking about how it can ask

for a discretionary hearing, such motion shall be made before the trial hearing or proceeding unless there was no opportunity to make such motion, or the person was not aware of the ground of the motion.

It is the Government's contention that, first of all, Mr. DeCavalcante had the opportunity to make such motion. Considering the fact that he was indicted in this matter on December 15, 1969, and on January 15, 1971, he moved to withdraw his plea of not guilty and he substituted his plea of guilty.

As to the awareness of a particular problem that there may be with electronic surveillance, I think it is common knowledge that Mr. DeCavalcante was the subject of electronic surveillance at one particular time in the early '60s.

As a matter of fact, that has been the subject of a book that has been published.

It would strain credulity to state that Mr. DeCavalcante himself, much less than his attorney, would not question whether or not the electronic surveillance was proper or not. They knew very well that there was the possibility of electronic surveillance, that the electronic surveillance could have been improper, and it was up to the attorney at that particular time to question every bit of it.

He should have checked the statute, should have gone into it, and it was his prerogative. He did not do so.

Oral Opinion of the United States District Court

THE COURT: Let me get that statute.

MR. DEL GRASSA: I would like to make an analogy between 2518(10)(a) to Rule 12 of the Federal Rules of Criminal Procedure, where the time to make a motion to suppress, you must make it within a certain time before or after the indictment. It is thirty days.

Now, they will allow a motion during the trial if it is a surprise situation. There is no surprise here, where a man has been indicted December of '69 and then he goes to change his plea in January of 1971. There is no surprise whatever. He was well-represented.

THE COURT: January of what —

MR. DEL GRASSA: He was represented by capable counsel.

THE COURT: He pleaded in January of '71?

MR. CORRADINO: Guilty.

MR. DEL GRASSA: He pleaded guilty and he changed his plea.

Now, the first claim was to withdraw his plea of guilty and was that certain assurances were made to him.

Now, that has been turned down by Judge Garth at a hearing in the District Court.

Oral Opinion of the United States District Court

THE COURT: That is not before me. You are not resurrecting the motion.

MR. CORRADINO: Not at all. No question of the voluntariness of the plea.

MR. DEL GRASSA: That's out.

THE COURT: Judge Garth already ruled on other issues, and those are not being resurrected now, correct?

MR. CORRADINO: None, right, that's correct.

MR. DEL GRASSO: The way I read the motion, — I'm sorry, I thought that that was being brought out again.

THE COURT: We have settled it.

MR. DEL GRASSA: Okay, fine. It is the Government's position that it is past this stage. The guilty plea cuts this off. It has foreclosed any such — how would I say? The defendant at this time cannot bring a motion to suppress when the guilty plea has foreclosed their motion to suppress.

MR. CORRADINO: Judge, I would like to have an opportunity to answer your Honor's question concerning: Are we precluded now?

I think the statute that we have cited in our brief, that we are using as the substance for this motion, which was construed

by Giordano, unequivocally sets forth when the motion can be made.

One of the times that the motion can be made is when the ground is available. That ground was never available until the present time, May of 1974.

THE COURT: What part of the statute?

MR. CORRADINO: 18 U.S.C. 2518, Section 10.

THE COURT: Second paragraph.

Wait just a minute now.

The ground was always available; the validity of the ground was not clear until the Giordano and Chavez cases this year.

MR. DEL GRASSA: Giordano was a judicial interpretation. However, the means to make the complaint were there. They never did so.

Always available.

THE COURT: The sentence you are referring to, Mr. Corradino, is, I think, this quote: "Such motion" — motion to suppress — "shall be made before the trial, hearing or proceeding, unless there was no opportunity to make such motion, or the person was not aware of the grounds of the motion."

Oral Opinion of the United States District Court

I think you are confusing facts with law. There is no contention before me that the facts were not available to you on which to predicate such a motion, under the issues involved in Giordano and Chavez.

Of course, it was not apparent until long after the plea that the ground was legally valid. But there is no contention here that the Government hid anything from you about the authorization had you sought it.

MR. CORRADINO: We are not contending that. In a sense, though, there was a little — there wasn't any hiding on the part of the U.S. Attorney's office, but this fact about Mr. Wilson signing applications when in fact he did not, in a sense is a little concealment. But there was no motion or request made where papers or documents that we requested were withheld.

THE COURT: It wasn't thought of. It wasn't gone into. It was bypassed, wasn't it?

I don't know what the attorneys of Mr. DeCavalcante did. I shouldn't say that because I just don't know.

There is no contention here that the facts weren't available had you sought them out or the Government concealed anything that led Mr. DeCavalcante's attorneys into foregoing such a motion, correct?

MR. CORRADINO: Unfortunately, I wasn't — I don't think so. That is not our position before your Honor today.

THE COURT: Is there anything further, gentlemen?

MR. DEL GRASSA: No.

MR. CORRADINO: Only, Judge, that I do submit the grounds that are available today were not available. It took the Supreme Court of the United States to make that decision. Everybody was under the impression —

THE COURT: The grounds were available. I think, Mr. Corradino, once the facts were established, the success of the motion on those grounds certainly wasn't clear until these two cases came down.

MR. CORRADINO: That is for sure. We feel, of course, that the grounds were not available until the Supreme Court set forth in their opinion that that situation was the way it was, and as a result of which those tapes were illegal and should be suppressed.

THE COURT: Gentlemen, this is a motion by the defendant, Samuel R. DeCavalcante, to be permitted to withdraw his plea of guilty and to enter upon a hearing under 18 U.S.C. Section 2518, pursuant to the legality of the wiretap evidence obtained by the Government pursuant to the indictment, or in pursuit of the indictment.

Mr. DeCavalcante was indicted in this case in December of 1969, and withdrew his plea of not guilty and pleaded guilty in January of 1971.

There was a plea bargain at that time in the nature of the withdrawal, a contention under what is called the dangerous special offender act.

Am I correct?

MR. DEL GRASSA: Yes, sir.

THE COURT: Mr. DeCavalcante apparently had some other convictions on appeal at the time. The Government recommended that the sentences be concurrent, or would not oppose a suspended sentence in light of those other matters. Those matters were in fact reversed, and apparently dismissed.

Now Mr. DeCavalcante, having served the sentence under this indictment, comes before the Court to contend, under the recent Giordano and Chavez cases, that evidence against him, and in light of which he pleaded guilty, was obtained illegally; and on that ground wants a hearing toward vacation of his plea.

I am willing to assume, arguendo, that factual hearing would establish that the evidence against Mr. DeCavalcante in this case was obtained in violation of 18 U.S.C., Section 2518, etc., as construed in the Giordano and Chavez cases.

I think it is the general rule that one who pleads guilty waives all pre-existing defects, at least non-jurisdictional defects.

18 U.S.C., Section 2518(10) says in part, "Such motion" — motion to suppress — "shall be made before the trial, hearing,

or proceeding, unless there was no opportunity to make such motion, or the person was not aware of the grounds of the motion."

Well, the facts were never hidden from Mr. DeCavalcante, the facts about who gave the authorization.

Whether the issue was considered and thought not meritorious or whether it was not considered by his then counsel, I don't know. I don't think it makes any difference.

In my judgment, under cases such as Brady against the United States, 397 U.S. 742 and United States vs. Vallejo, 476 Federal Second, 667, 1973, I believe that Mr. DeCavalcante by his guilty plea is foreclosed from raising any issue concerning the illegal gathering of evidence by the Government, prior to that plea, even if the existence of such evidence was an inducement to the plea.

This is the only ground before me. I think the issue is foreclosed by the plea which was voluntary.

Therefore, the motion of the defendant to vacate the plea is denied.

There will be no hearing under the statute.

Pursuant to Section 753, Title 28, United States Code, the foregoing transcript is certified to be an accurate record as taken stenographically in the afore-entitled ceeding.

LEE B. BEAL

APPENDIX B — ORDER OF UNITED STATES DISTRICT COURT FILED DECEMBER 3, 1974

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

Criminal No. 544-69

CRIMINAL ACTION

UNITED STATES OF AMERICA

Plaintiff,

vs.

SAMUEL RIZZO DeCAVALCANTE,

Defendant.

This matter coming on to be heard before the Honorable H. Curtis Meanor, on the 11th day of November, 1974, in the presence of G. Dolph Corradino, Esq., appearing for Leibowitz & Corradino, Esqs., attorneys for the Defendant, Samuel Rizzo DeCavalcante, and Robert G. Del Grosso, Esq., appearing for the Plaintiff, United States of America, on Defendant's Notice of Motion for a hearing pursuant to 18 U.S.C. 2518(10) and other relief and the Court having read the pleadings and having heard the arguments of counsel and for good cause shown,

Order of United States District Court Filed December 3, 1974

IT IS thereupon, on this 26 day of November, 1974, ORDERED that the relief asked for in Defendant's Notice of Motion be denied.

H. CURTIS MEANOR
H. CURTIS MEANOR
Judge of the United States
District Court, District of
New Jersey

Original Filed
Dec. 3, 1974
Angelo W. Locassio, Clerk

APPENDIX C — OPINION AND ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 74-2272

UNITED STATES OF AMERICA

v.

SAMUEL RIZZO DE CAVALCANTE, CHARLES MAJURI, JOSEPH IPPOLITO, ANTHONY DE PASQUE, ALESSIO BARRASSO, NICK ZARRO, RALPH MASCIOLA, JOSEPH ANTHONY FERRARA, THOMAS J. LA MANNA, FRED SPRINGER, CARRIE WILLIAMS, LEABERT FISCHER, ROBERTA DRAKE, MARIE D'ADDARIO, ANTHONY DE RASMI, JAMES ADAMS, BENJAMIN ADRAGNA, LULU MAE BROWN, CORA CAMPBELL, PETER CARLO, WILLIAM COLEY, SHIRLEY HILL HUDSON, CHARLES HOUSE, CHRISTIAN HUTCHINS, MARIE JELKS, LUELLA JIGGETS, EDWARD LUTZ, ELLA ODOM, RAMON PEREZ, ALICE ROBIN, EUGENE ROGERS, ROCCO SANITATE, GEORGE SMITH, HAROLD STUBBS, JAMES THOMAS, ELIAS VERA, ANNA WOOD, RUDELCINDO LUCIANO, MAGDALENA LUCIANO, TEODORO LOPEZ, LUIS RODRIQUEZ, JOSE COLONDRES, GREGORIO RIOS, RAFAEL FERNANDEZ, DAMIAN CARDONA, PERFECTO MALDONATO, ROBERTO RODRIQUEZ, GUILLERNO ROSADO, ADY CALVO, PEDRO RODRIQUEZ, ESTEBAN CRUZ, TERESA PUBILLONES, CARLOS LEON

Opinion and Order of the United States Court of Appeals for the Third Circuit

Samuel Rizzo DeCavalcante, *Appellant*

(D.C. Crim. No. 544-69)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Submitted under 3rd Cir. Rule 12(6) April 7, 1975

Before BIGGS, VAN DUSEN and ALDISERT,
Circuit Judges

G. Dolph Corradino, Esq. and Kenneth P. Ippolito, Esq., Leibowitz and Corradino, East Orange, New Jersey,
Attorneys for Appellant

Jonathan L. Goldstein, U.S. Attorney;
William T. Pizzi, Assistant U.S. Attorney;
John J. Barry, Assistant U.S. Attorney;
Attorneys for Appellee

JUDGMENT ORDER

After considering the contentions raised by appellant that the court erred (1) in finding the appellant's motion pursuant to 18 U.S.C. §2518(10) to be untimely; and (2) in refusing to allow

the appellant to withdraw his January 15, 1971, guilty plea pursuant to F. R. Crim. P. 32(d).[1]

It is ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT: —

s/ Van Dusen
Circuit Judge

Attest:

s/ Thomas F. Quinn
Thomas F. Quinn, Clerk

Dated: April 8, 1975

1. The district court did not abuse its discretion in refusing to allow the appellant to withdraw his guilty plea. See *Paradiso v. United States*, 482 F.2d 409 (3d Cir. 1973); *United States v. Vallejo*, 476 F.2d 667 (3d Cir.), *cert. denied sub nom. Miller v. United States*, 414 U.S. 830 (1973).

In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 74-1397

SAMUEL RIZZO DECAVALCANTE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that the district court erred in denying his motion to withdraw his guilty plea and in refusing to conduct an evidentiary hearing as to the existence and validity of certain court-authorized wire interceptions.

1. On December 15, 1969, an indictment returned in the United States District Court for the District of New Jersey charged petitioner and 52 others with conspiracy to violate 18 U.S.C. 1952 by promoting and managing a gambling enterprise prohibited by state law and by traveling in interstate commerce and using the telephone to do so, in violation of 18 U.S.C. 371.

At that time petitioner was already under indictment in the same court on three counts of conspiracy and extortion. On September 15, 1970, trial commenced on the extortion case, resulting in conviction of petitioner and

his co-defendants in that case; on October 2, 1970, he was sentenced to consecutive terms of five years' imprisonment on each count. Petitioner's appeal from this conviction was argued on December 10, 1970.

On January 2, 1971, while that appeal was still pending, petitioner pled not guilty to the instant gambling conspiracy indictment, and trial was set for February 1971. On January 15, 1971, at petitioner's request and following a hearing, the court permitted him to withdraw his not guilty plea and to plead guilty. The prosecution had advised petitioner's counsel that it would recommend that any sentence pursuant to the gambling charges run concurrently with the sentences previously imposed on the extortion convictions, and that the government would not oppose a suspended sentence. See *United States* v. *DeCavalcante,* 449 F.2d 139, 140 (C.A. 3), certiorari denied, 404 U.S. 1039.

On March 10, 1971, the court of appeals reversed petitioner's conviction in the extortion case, directing an acquittal on two counts and requiring a new trial on the third. *United States* v. *DeCavalcante,* 440 F.2d 1264 (C.A. 3). Two days later petitioner moved for leave to withdraw his guilty plea in the gambling case, but, after a hearing, the court denied the motion. Petitioner was subsequently sentenced to a term of five years' imprisonment and a fine of $10,000. The court of appeals affirmed the denial of leave to withdraw the guilty plea, based upon the trial court's finding that the plea "was entered voluntarily and knowingly, without any misunderstanding, misrepresentation or improper inducement," and that withdrawal of the plea would present a "significant potential prejudice to the prosecution * * *." *United States* v. *DeCavalcante, supra,* 449 F.2d at 141.

2. Following this Court's decision in *United States* v. *Giordano,* 416 U.S. 505, petitioner moved in the district court to vacate his plea of guilty under Rule 32(d), Fed. R. Crim. P., and to conduct a hearing pursuant to the provisions of 18 U.S.C. 2518(10), concerning intercepted wire communications.[1] Petitioner claimed that a hearing was justified to determine whether his indictment on the gambling charges was the result of evidence obtained by a wire interception and, if so, whether such electronic surveillance had been properly authorized as required by 18 U.S.C. 2516(1). Petitioner further argued that if such wiretaps were improperly authorized, and the evidence obtained thus subject to suppression under *Giordano,* he should be entitled to withdraw his plea of guilty under Rule 32(d).

In denying petitioner's motion, the district court assumed, *arguendo,* that a "hearing would establish that the evidence against Mr. DeCavalcante in this case was obtained in violation of 18 U.S.C., Section 2518 * * *" (Pet. App. 16a), but it concluded that petitioner's guilty

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[1]Section 2518(10) provides in pertinent part:

> (a) Any aggrieved person in any trial, hearing, or proceeding in or before any court * * * may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom * * * [on specified grounds].
>
> * * * * *
>
> Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion.

Both the district court and the court of appeals properly noted that petitioner's motion for a hearing under 18 U.S.C. 2518(10) was untimely under the provisions of that statute (Pet. App. 16a-17a, 21a-22a).

Rule 32(d) provides in pertinent part:

> [T]o correct manifest injustice the court after sentence may set aside the judgment of conviction and permit the defendant to withdraw his plea.

plea foreclosed any inquiry into the legality of the means by which the evidence was obtained (*id.* at 15a-19a).[2] The court of appeals affirmed (Pet. App. 21a-22a).

3. The courts below correctly ruled that petitioner was not entitled to a hearing to explore the legality of the government's means of obtaining evidence that led to petitioner's indictment and subsequent guilty plea. This Court recently reiterated the governing principle:

> [A] guilty plea represents a break in the chain of events which has preceded it in the criminal process. When a criminal defendant has solemnly admitted in open court that he is in fact guilty of the offense with which he is charged, he may not thereafter raise independent claims relating to the deprivation of constitutional rights that occurred prior to the entry of the guilty plea. [*Tollett* v. *Henderson*, 411 U.S. 258, 267.]

Contrary to petitioner's assertion (Pet. 5), the fact that he entered his plea of guilty prior to this Court's decision in *United States* v. *Giordano*, *supra*, does not alter this principle. See *Tollett* v. *Henderson*, *supra*, 411 U.S. at 267; *Brady* v. *United States*, 397 U.S. 742, 757.[3]

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[2]Although petitioner asserts a "strong possibility" that his indictment was based on evidence derived from an invalid wiretap authorization (Pet. 3), the record here does not even establish that any communications were intercepted as to which petitioner has standing to complain.

[3]Petitioner raises "[n]o question" about the competency of counsel representing him in connection with the guilty plea with respect to the failure to challenge the validity of any pertinent interceptions (Pet. App. 7a).

Nor does the possibility that petitioner might be able to demonstrate that evidence against him was illegally obtained demonstrate such "manifest injustice" that it was an abuse of discretion for the district court to decline to vacate his guilty plea under the Rule 32(d). Even if petitioner could make such a showing, that would not impugn the truth or reliability of his plea. See *Tollett* v. *Henderson, supra,* 411 U.S. at 263-264.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

JULY 1975.